United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: Director
U.S. Fish and Wildlife Service

From: Charles P. Raynor
Assistant Solicitor
Division of Conservation and ~~Wildlife~~
and Environmental Enforcement

Subject: Authority for the Fish and Wildlife Service to Obligate Public Funds for Private Land Habitat Projects

This responds to legal questions raised by the U.S. Fish and Wildlife Service regarding the Service's legal authority to expend Federal funds on private lands under Partners for Wildlife Extension Agreements and Cooperative Agreements with private landowners. Questions also have been raised regarding expenditure of contaminants-related damage settlement funds to restore fish and wildlife habitat on private lands.

It is our understanding that the U.S. Fish and Wildlife Service has been restoring degraded Federal trust species habitats on private lands since 1987 under its Partners for Wildlife program. With this program, the Service provides financial and technical assistance to private landowners through voluntary landowner agreements. Under such agreements, landowners agree to maintain the restoration projects as specified in the agreements, but otherwise retain full control of the lands in question. However, there has apparently been some questions raised as to the Service's authority to obligate public funds to conduct habitat restoration work under these and similar programs on private lands.

The Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) and the Fish and Wildlife Act of 1956 (16 U.S.C. 742a-j), as amended, grant the Service broad statutory authority to enter into voluntary agreements with non-Federal governmental entities, including private landowners, to restore and enhance habitat for Federal trust fish and wildlife resources. Under provisions of the Fish and Wildlife Act of 1956, the Secretary of the Interior shall "...take such steps as may be required for the development, advancement, management, conservation, and protection of fish and wildlife resources, including, but not limited to, research,

development of existing facilities, and acquisition by purchase or exchange of land and water, or interests therein." (16 U.S.C. 742f(a)(4)).

This language provides broad authority for the Service to conduct those activities necessary to carry out its mission to conserve and protect fish and wildlife resources. We believe that the Service's role of entering into Wildlife Extension Agreements, Cooperative Agreements, contracts, and similar arrangements with private landowners to expend Federal funds appropriated by Congress to restore Federal trust species habitats on private lands are such activities authorized by the act.

In an often cited opinion on the matter of expending appropriated funds for improvements on private lands, the Comptroller General states:

> ...the established rule is that appropriated funds ordinarily may not be used for permanent improvements to private property unless specifically authorized by law. 5 Comp.Dec. 478; 6 id. 295; 2 Comp.Gen. 606; 15 id. 761; 19 id. 528. The rule is one of policy and not of positive law; consequently, such improvements are not regarded to be prohibited in all cases.
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> In addition, the decisions of the accounting officers have recognized that, notwithstanding the rule, improvements of a permanent character on land not owned by the Government are permissible in exceptional cases. That is, if appropriations are otherwise available therefor, provided such improvements are determined to be incident to and essential for the effective accomplishment of the authorized purposes of the appropriations; that expenditures for such purposes are in reasonable amounts and the improvements are used for the principal benefit of the Government; and provided that the interests of the Government are fully protected with respect thereto.

42 Comp. Gen. 480; 1963.

In evaluating whether such a project meets the criteria for expending federal funds on improvements to private property, the determinate factors should focus on the "reasonableness" of the expenditure and whether the improvement will be utilized for the "principal benefit of the Government." Taken together, the essential question in evaluating each project is whether the Government is furthering a legitimate objective, and if the value of what is being achieved towards this objective is at least equal to the federal funds being expended on the project.

Furthermore, since these projects are indeed "federal actions," it is necessary that the Service comply with all applicable environmental laws such as the National Environmental Policy Act (NEPA) and the Endangered Species Act, as well as the various other statutes which protect historic, archeological and Indian artifacts.

Finally, we would emphasize that the U.S. Fish and Wildlife must ensure that the value of the governmental objective to be achieved must be maintained by agreements or contracts which provide a mechanism for the recovery of funds if the terms and conditions of the projects are breached.

If you have any questions on this matter, please contact Larry Mellinger of my staff at 202-208-6172.